Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

GERALD MCCLAIN,

Petitioner,

vs.

YONG H. RHO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

1.) Where the trial court grants a summary judgment on authority the movant concedes was error, may the Court of Appeal nonetheless affirm on a mixed question of law and fact that was not advanced to the trial court?

2.) Where the Court of Appeal affirms on the basis of a new contention raised for the first time on appeal, does it not violate notions of Due Process and Equal Protection to refuse even to consider the rebuttal?

3.) Where the Court of Appeal does not negate the complaint as a whole, does not construe the opposition liberally, and holds for the movant as a matter of law, is not the Sixth Amendment's guarantee of a jury trial violated?

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OPINIONS BELOW

The opinion of the California Court of Appeal that gives rise to this Petition is unpublished and is reprinted in the Appendix hereto ("App. 1"). The order of the California Supreme Court dated October 16, 1996 appears at App. 13.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Due Process and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and The Right to Trial by Jury as guaranteed by the Seventh Amendment.

ISSUE PRESENTED

Does an appellate court reviewing the granting of a Summary Judgment Motion violate an appellant's right to procedural due process by affirming a clearly erroneous ruling by the trial court through reliance on an isolated fact in the record which the appellant never had an opportunity to contest and by drawing unreasonable

speculative inferences therefrom in a manner favorable to the moving party.

INTRODUCTION

This case began as a personal injury lawsuit arising out of my neighbor of eight years perpetuating a nuisance through the harboring of dogs, and other animals, by allowing his tenant to maintain the animals in a common area of his apartment complex. My reason for bringing the case to the attention of this court is because of the abuse of the Summary Judgment process of the State of California I suffered while trying to pursue my right to sue said neighbor for his violating my right to live free from the nuisance he negligently allowed to happen over the period of many years. This negligence climaxed when I was put under the very great stress of having to witness a small dog being seriously abused, and for an extended period of time, which I could not endure, and then injured myself attempting to help the dog. I subsequently filed a lawsuit resulting from my injuries.

A motion for a summary judgment was granted to the defendants in the case, which I appealed first in the Court of Appeal, State of California, Second Appellate District, Division Three and, then, to the State of California Supreme Court. The defendants won their motion for a judgment in the Superior Court of the County of Los Angeles, Department No. 52 as the result of conspicuously blatant mistakes made by the court. The Court of Appeal compounded the mistakes made by the previous court by its own even more serious distortions of the law

governing appeals. And, finally, the California Supreme Court refused to even hear my petition, a decision which has serious implications for any wronged plaintiff seeking their right to due process as granted by our Constitution.

I intend to make it as clear as possible how I have been wronged by the Summary Judgment process as practiced by the state of California and by the California Court of Appeals as well. I can only hope that whoever reads this will be able to put himself or herself in my place and be moved to give this appeal a fair consideration for the civil rights issues I feel are at stake. My right to a jury trial, as guaranteed by the Sixth Amendment, was violated. This violation, and the way it was perpetrated, should not go unnoticed.

While not the issue of my appeal, crucial to understanding its development are the mistakes made by the Los Angeles County Court which granted the Summary Judgment in the first place and, then, the rules governing the making of appeals – rules which I was forced to follow, and which my attorney, at the time, did follow, but which the defendants were allowed to misuse. The law specifically holds the dimensions of an appeal to whatever is already in the record. This was to a very great disadvantage to my appeal because there was a volume of material that could have been added to my part of the record but which was not included as my attorney then, Mr. Joel Goldberg, did not feel it necessary. I feel no hesitancy in making that known here because the Second Appellate District Court has already made a path for my doing so by turning the law on its head by considering a new theory by the defendants which it then

used to deny my appeal. The opinion about the theory is one that could have rightly gone to a jury for consideration but instead was arbitrarily granted credibility and used to deny my appeal.

So to properly understand what my appeal to this court is about and why I feel compelled to make it I'll describe events as they proceeded from the causes of my accident and subsequently from one court to another:

Immediately after a small apartment complex, next to a house I had been renting for fifteen years, was sold a new tenant moved in and began keeping animals in the yard. The animals were sometimes dogs and sometimes rabbits but mostly dogs. The dogs were sometimes tied to trees and sometimes not. The dogs kept there often changed so that most of the dogs did not stay very long. But the condition of animals in the yard remained and frequent barking persisted. Often there were many animals present. It must be understood that Los Angeles has a very lax and inefficient way of dealing with such problems. I tried often to talk to the people who lived there about the problem. But it didn't help as they always claimed to not speak English. No emergency phone numbers or address was posted so I would go to all the apartments, attempt to speak to the children as well as the adults and leave notes in the mailboxes attempting to locate a manager or owner of the property. I repeated this process many times over a six-year period as well as approaching people at random I happened to see on the property. At the very least everyone on the property was well aware of my concern for the problem, none of who would even talk to me. I called the Los Angeles department of animal control which told me I had to contact

them in writing after which they did nothing. After writing to them once and calling several times I was told I had to write to them again. It was a futile process. So I could do nothing but endure the situation, which I did the years I continued to live there. For a year a friend, and willing witness, lived with me who experienced the same nuisance and lack of success in trying to deal with the problem. To bring my case to court I had gathered witnesses, including a mailman,[1] documenting the history of the nuisance to directly refute the untruthful declarations made by the defendants – which was the only evidence their motion was based upon.

My own statement relating to the history of the situation should have been enough to balance the defendants. It might have done so, if the court hadn't proceeded to issue its decision founded upon two of its own mistakes. The first was its acceptance of a case the defendants used to support their position, *Uccello v. Laudenslayer*, 44 Cal.App.3d 504 (1975). The Ucello case involved a dog living at an apartment building but otherwise bore no resemblance to the facts of my case. My case involved dogs being kept in a common area and the Ucello case did not. Except for a dog living at an apartment there were no similar facts between the two cases. Yet the court emphasized the Ucello case as setting a precedent for granting the judgment. The court then misquoted, and mixed up the facts of my own statement, as support for

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[1] The mailman, Pedro Arrambide, would testify to witnessing one particular day in the yard for at least one full year of the times the defendants declared under oath no dogs existed.

its decision. In my own declaration I said that, "Constantly, year in, year out, dogs appeared and disappeared from the property." The court rearranged this statement of mine to the following: "To the contrary, plaintiff in his declaration states the dog appeared and disappeared on the premises. This would tend to support the defendant's claim they had no actual notice this dog was present. The dog was not on the subject property permanently." Thus the court transposed the six-year period my statement described into one inaccurately describing the events of one day.

The court did not simply distort my words but misread and mixed them up to produce a farcical interpretation which it used to justify its decision based on its previous mistaken reading of the *Uccello* case. Such was the manner in which my case was dismissed with a Summary Judgment.

I know whoever's reading this, and the court as well may state, that this is not the proper way to do an appeal. But I think in writing this I'm doing the right thing. Because this is not simply a situation of an appeals court making a mistake, but of its negligent usurpation of due process. I think the Supreme Court should have some knowledge of the way cases like mine can be so mishandled and garbled to the extent of actual events of the court system making a mockery of the concept of due process. So that's my thinking as I proceed to describe my appeal to the Summary Judgment.

At this point I hired another attorney to appeal the Los Angeles County Superior Court's decision, Mr. William Cleary. Mr. Cleary's work for my appeal, in my

opinion, was well done. I think he did a good job of researching and explaining the issues. He brought out why the *Uccello* case should not have been used to support the defendants' case. The defendants, in their opposition, grudgingly acknowledged the Ucello case had been wrongly used, but then changed direction by propounding a new theory in support of a judgment. Their new theory mostly consisted of trying to refute my own declaration while creating the idea I had not spent enough time trying to locate the defendants. This idea was newly put forth to the court, and it should have been rejected outright. But in summing up its opinion affirming judgment, the court stated it felt six hours was not enough time to give the defendants notice. The court did affirm I acted properly in trying to save the dog. Whether six hours is enough time to notify someone a dog is being tortured in their front yard should be a matter for a jury to decide and not arbitrarily decided by an abstract judgment. The circumstances of the whole case should have been examined. The appeals court was wrong in imposing such a decision. In my petition for a rehearing my attorney, William Cleary, succinctly put forth the argument which we feel should have given the court a reason to reverse its opinion: "This incident was simply the latest in a long history of barking, the instrumentality of the tort. To crop the picture at six hours is to alter the evidence, which as a whole dealt with a very long period of time. This is all the more distressing because the canon of construction for Summary Judgment requires McClain's position to be liberally construed, which is not the case if six years is lopped off and the period is so

narrowly telescoped into a six hour period." In its opinion it would seem the court was so rigidly predisposed to uphold the judgment it would not hesitate to limit the affirmative circumstances of my case to do it. Because that's what it did.

The court chose to believe everything the defendants stated in their opposition no matter how farfetched its distortion of the facts as I had lived them. In their opposition to my appeal the defendants made one outrageous claim after another. In my original opposition to the motion for a Summary Judgment I made the statement, as quoted before, that, "Constantly, year in year out I had been bothered by barking dogs." To me the statement means just what it says. The condition of the dogs being a nuisance persisted throughout the years. But the defendants, in their opposition to my appeal, did everything they could to diminish my statement as well as make it mean something else. They said I offered no evidence a dog was ever tied to a tree, had ever complained about any dogs, probably because I never did, that this was an isolated incident, they said I acknowledged I hadn't notified the defendants of the dog despite the fact I had spent years trying to notify them of the general nuisance created by dogs on their property, not to mention the painful large part of a day I had scoured their property looking for the defendants or anybody who could help the dog, and, additionally, they made a variety of other speculatory assumptions – all of which I could have repudiated, with my own testimony as well as by the testimony of several witnesses, as well as with copies of letters and documents, if my case would have gone to court as it should have done. For example, they quoted and

requoted my statement made at a deposition that I did not recall seeing another "dog" in the yard for the previous six months. This was out of context. I should have been given the opportunity to explain I was away in Florida visiting my mother some of that time as well as to describe how the yard had been filled with rabbits for those months of that period, a condition I was also concerned about. The Summary Judgment process effectively prevented me from saying anything beyond the very brief declaration I was allowed to make in my opposition to the motion. That rule did not hold for the defendants.

In the conclusion to their opposition, to my appeal in the Second Appellate District, realizing their use of the *Uccello* case wasn't defensible, the defendants say, "If right upon any theory of the law applicable to the case, it must be sustained regardless of the consideration which may have moved the trial court to its conclusion." What the actual theory is they were talking about isn't clear. They constructed a confused hodgepodge of conjectures which they tried to make into the facts of my case. But they offered nothing concretely new except the hope there was such a theory. The court, in the conclusion of its opinion affirming the judgment gave life to such a theory for them. In the conclusion of its opinion affirming the judgment the court decided the six hours I had frantically looked for someone on the defendant's property was not enough time to give them constructive notice of the condition. And by so doing the court dismissed the previous six years I had been trying to deal with the nuisance condition that progressed into the anguished state for one of the dogs that caused my accident. In fact the condition itself of the dog being abused was continued at least for

another twelve hours, and I could bring a witness to court to testify she saw the dog with its head again retied directly to a tree still being abused until noon of the next day. In my statement to the court I said there was a dog in the yard being abused, and I could prove what I said. In the matter of six hours being a long enough time to give notice such a question itself should be of a great enough triable issue, an important enough question to be decided by jury. In writing his petition for a rehearing William Cleary answered the court's skewed decision thusly: "Finally, and, perhaps, most importantly, the plaintiff wishes to register his objection to the uneven treatment he's received from the court. The Summary Judgment was based upon inapposite case law, acknowledged as such by the defendants on appeal. What defendants then did was to advance a new contention of mixed law and fact that six hours was insufficient to give Rhos notice of the condition. This was not argued below, and as a rule it cannot be raised for the first time on appeal. *Cramer v. Morrison* (1979) 88 Cal.App.2d 873, 887.) It's extremely perplexing, then, to find the court's opinion turn on notice when at the very same time it refuses to consider the response we made about notice being prevented. (Opinion, p.12 fn.7.) It's even more perplexing that the court rejects our argument based on a non sequitur that as six hours was too little time to give constructive notice it need not consider the theory that notice was prevented."

Throughout their papers the defendants said there were no triable issues to my case. To oppose their motion I declared there were animals, mostly dogs, kept on their property year in and year out. They declared they never

knew of any dogs being kept on the property and so could not have been responsible for the mistreatment of the dog in question. Isn't what the defendants should have known a triable issue. The defendants declared they turned complete control of their property, including a yard common to several apartments, over to a tenant and so weren't responsible for what happened there. Isn't that a triable issue. The defendants claim they were not given notice of dogs on their property, and I claim I tried for years to find someone in authority to who I could give notice. Isn't that a triable issue. The appeals court arbitrarily decided that the first six hours of the emergency situation created by the dog being abused wasn't enough time to give constructive notice. Couldn't it have easily have decided the minimum length of time needed for notice was a triable issue. If the straightforward circumstances of the *Uccello* case were enough to send that case to court, why aren't the more complicated, but just as grievous, circumstances surrounding a landlord's duty of care, his responsibility to see that his property is properly used, enough to send this one to court. The question may answer itself as the case seems to be one that doesn't fit easy categories. There are no precedents for cases involving people it's generally felt are so foolhardy by nature as to climb over a fence at midnight to help a small dog, no matter what it's suffering. So the system's first impulse is to get rid of it.

However the case is by virtue of itself a triable issue. It involves the issue of the rescue doctrine and a third party compelled to enter a neighboring premises combined with a nuisance case combined with a landlord

denying he knows his tenant kept animals on his property in the common area of an apartment complex over a six year period. The nature of the case itself should have compelled it to go to court in the first place. But it has now taken on a new dimension.

Mr. Cleary I think articulately and adequately addressed the constitutional issues at stake in this case. I would only like to add, to what he has written, that I feel the Summary Judgment process in the state of California has gotten out of control. Cases, like mine, are being shredded out of their rightful place in the court system. More stringent guidelines are needed to make the courts themselves obey the law.

I want to add here my reason for writing this part of this appeal myself is because I can no longer bear the financial burden of hiring an attorney. I've been very satisfied with my appeal attorney. The petition he wrote for the California Supreme Court formally outlining the constitutional issues follows. And while I have no legal training I feel he did a good job of framing the constitutional issues at stake. The Appeal's Courts of California should have given what he wrote serious and proper consideration. But they didn't. His work was dismissed with an unpublished opinion (my petition to have the opinion published was refused) by the first court and with no comment at all by the second. But as Mr. Cleary wrote, this is not a trivial case. Its implications are far reaching. What follows as part of this petition is what Mr. Cleary addressed to the California Supreme Court.

STATEMENT OF THE CASE

Petitioner McClain badly injured his left leg when he fell from a fence owned by the respondents Rhos. The Rhos owned a four unit apartment complex next to the apartment where McClain lived.

One of the Rhos, tenants (Yu) tied a small dog to a tree in the front yard to chase stray cats away. The dog was small, perhaps a puppy, and its neck was tied directly to a tree trunk in a cruel way; the dog was tortured. As a result, it barked, whimpered and cried until, six hours later – about 11:30 p.m., – McClain climbed a four foot chain link fence, loosed the dog, and fell climbing back.

McClain had scoured the premises at least six times before taking action himself; he went door to door but no one was at home, and the property was unattended. Not even an emergency phone number was posted outside the locked entrance. McClain called the police, but they told him to call Animal Regulation. When he called Animal Regulation, McClain got a recording.

This was not the first time McClain was bothered by barking dogs. It had been a fairly constant problem since 1987 when the Rhos bought the property. That is, off and on for *six years* prior to this incident barking dogs had disturbed the petitioner. (The proof showed rabbits as well; the common area was a barnyard.)

A. The Motion

The Rhos moved for summary judgment submitting two identical declarations which showed they were

absentee landlords, that they visited their property twice a week, that they denied knowledge of the dog in question, and that they only learned later what their tenant had done. Significantly, the Rhos did not controvert McClain's declaration at all – in effect the six years of barking was conceded. McClain's complaint was framed in two counts, negligence and nuisance. (CT-1-8.)

B. The Trial Court's Decision

The theory of the summary judgment was limited on the negligence count to lack of duty – this was the only theory presented. In support defendants cited *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d. 504, which the court adopted, holding that a landlord had no duty to a tenant's guest who may be bitten by a dog on the *demised* premises. (This dog, in contrast, was in a common area over which the landlord had a non-delegable duty of care. (4 Witkin, *Real Property*, §607(a), p. 788 (9 Ed. 1987).) The court also accepted at face value the Rhos' declarations that they did not actually know of the dog. (RT 2; CT-60.)

On the nuisance theory, the court held that without proof the dogs were present at the time of leasing, the landlord could not be liable for a nuisance created by the tenant, citing *Anderson v. Souza*, 38 Cal.2d. 825 (1952). (In fact the dogs appeared almost immediately upon the leasing. (CT-60.)

C. The Court of Appeal

On appeal the defendants effectively conceded that the case they relied upon and which the trial court adopted – *Uccello* – did not apply because *Uccello* dealt with the demised premises, not, as here, a common area. Yet, they argued that a decision right for any reason must be affirmed on appeal. In this connection, the defendants argued for the first time on appeal that the six hours during which McClain sought the owners was not sufficient time to give the Rhos *constructive notice* of the dog. McClain objected in his reply brief to this change of theory, as a mixed question of law and fact cannot be raised for the first time on appeal. (*Cramer v. Morrison* (1979) 88 Cal.App. 3d. 873, 887.) Alternatively, McClain argued that notice was *prevented*, as the property was deserted, unattended, without a notice of an emergency phone number, and the public authorities would not respond. Therefore, assuming lack of actual knowledge and constructive notice, the issue was whether the frustrated attempt to give actual notice raised a triable issue of fact.

The Court of Appeal, in a distressing departure from precedent which it did not explain, not only held *as a matter of law* that six hours was insufficient to give the Rhos constructive notice – thereby absolving them of negligence – but also refused even to consider McClain's answer to this argument – that notice was prevented – *because*, in a nonsequitur, they accepted defendants' no-notice contention as a matter of law and because McClain could cite no authority for his position. (Opinion, p.12, fn. 7; Appendix.) That the reason for the rejection is a nonsequitur is clear – holding no constructive notice as a

matter of law does not meet the claim that notice was prevented – that the Rhos made actual notice impossible.

The court then held that as there was no notice there could be no negligence, and there could be no nuisance growing out of negligence, either. (Opinion, p. 13.) It therefore affirmed the summary judgment.

In the petition for rehearing, McClain showed that the operative act of the tort – barking – had continued for six years and about this the Rhos *had* to have notice. This was merely the latest example of barking. He also argued that notice was unnecessary for nuisance as it is a form of liability without fault, and that it was manifestly unfair to accept a new factual theory on appeal and make it the basis of the decision, but at the same time reject plaintiff's answer to it. (The court rejected the petition for rehearing on July 10; the original opinion was filed June 27.)

ARGUMENT

I The Court Violates Statute And Constitution

a.

It is, of course, fundamental to summary judgment that the opposition papers be liberally construed and that the moving party negate the complaint, or some essential element of it, even if not separately pleaded. (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 714.) This rule was turned upside down; not only did the court accept a new defense on appeal, it simultaneously rejected plaintiff's response to it. Is it not apparent that in accepting the

defense's contention on appeal that six hours was insufficient time to give constructive notice as a matter of law that the court has liberally construed the opposition papers, even at the cost of jettisoning the canon of review that prohibits such a contention from even being raised? And, is not the error further compounded when the defendants further concede the judgment was in effect granted in error?

We, of course, are mindful of the need for judicial economy and of the change of attitude now favoring such motions. But at what cost? As Justice Lillie has remarked in another context, judicial economy cannot be purchased at the expense of judicial integrity. (*Gutierrez v. Superior Court* (1994) 24 Cal.App.4th 153, 169-170.) The court of appeal not only disregards the rules of summary judgment but of appeal itself, almost as though acting under original jurisdiction. The entire structure of judgment and review are disregarded to dispose of a case, seemingly, only to save time.

(i) Foreseeability

Furthermore, the court did not dispose of the case as a whole, even under its expedited procedure. As the rule requires movants to negate the complaint as an entirety, even of those claims not separately pleaded (*Lopez, supra*), one wonders how the court justifies disposing of the negligence claim on lack of notice when the undisputed facts raised an issue of foreseeability. That is, the court constricts the operative events to those of the day in question when the proof was that barking occurred over

six years. The obvious problem presented by the disposition is whether the Rhos should have *foreseen* this incident, if not specifically, at least generally. Put differently, the motion showed negligence in failing to control the property to prevent repeated and recurrent barking. But the court focused only on the day in question, asking only what the Rhos knew on that day. Assuming without conceding that the Rhos did not know, still that fact does not disprove that they could not have *foreseen* this event. Indeed, the evidence stands *undisputed* that the barking preceded the event for six years. What the Rhos did, if anything, in response does not appear. And, again, this was in a common area over which they had a nondelegable duty of care. Is it not apparent that the court of appeal has not negated the complaint, even on appeal?

In an aggravating way, the court sort of anticipates this objection by reciting (for the first time on appeal) that McClain was bothered by the torture of the dog, not its presence. This, simply, is not so. McClain's peace and enjoyment of his property were disturbed by the *barking*, barking that occurred for six years. It was only in response to the barking that McClain learned of its cause, but that did not change the character of the disturbance. It may be true, as the court assumed, that this was the first incident of barking from torture, but it was not the first incident of barking.

This court has spoken about third party foreseeability in another context, making clear that liability for the tort does not depend upon the occurrence of the identical conduct a second time, but only upon foreseeing the *general character* of the event based upon prior experience. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d.

112; see also, *Napolin v. Hotel Rose*, 137 Cal.App.2d. 701.) Thus, the fact that this is a case of tortured, as opposed to unprovoked, barking is not germane. And, as it is not, holding this was the first incident of torture does not negate the complaint as a whole. Indeed, the law is that a landlord who knows or should know that the tenant's ordinary use of the premises creates a nuisance is liable to third parties so injured. (*Burroughs v. Ben's Auto Park* (1945) 27 Ca1.2d. 449.)

Is it not clear, then, that in approach, upon review, and on substance the court of appeal departs from established law? Some definite reaffirmation of the law is necessary.

b.

The court commits an egregious constitutional error as well. After all, summary judgment to some extent *already* abridges the constitutional right to jury trial. To further liberalize the departure with unprecedented resort to *ad hoc* reasoning compounds the abridgement. This is particularly so when the appellate court resorts to fictions – no notice as a matter of law – to support its digressions.

This raises a due process problem to which all courts – but especially, appellate courts – must be sensitive. As the courts are themselves the only check on extra-constitutional action, they must be on guard for short cuts they themselves take. That is, the Constitution is a safeguard against all governmental action including judicial action.

This principle has just begun to receive recognition. The Supreme Court has decreed that a state court could not by judicial fiat award interest to the state on an interpleaded fund in court. It represents a taking *without due process,* a judicial taking. (*Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 101 S.Ct. 446.) That is, the courts cannot rule by "ipse dixit," mere say so. (Id., 449 U.S., at 164, 101 S.Ct. at 367.)

It follows, of course, that not every action taken by a court satisfies due process merely because a court takes the action. The departures have already been seen in detail above. The issue would seem to be whether this court is yet ready to adopt the federal rule as the law of the state. This is a good case to do it. It's an important principle to establish as it shows that all the procedural rules of summary judgment and of appellate review have constitutional underpinnings.

(ii) Equal Protection

If the court cannot take certain actions in violation of due process, it cannot take them in violation of equal protection, either. And perhaps here we reach the most galling feature of the court's opinion: that it accepts defendant's contention for the first time on appeal, which it adopts as its decision; but, at the same time, it refuses even to consider plaintiff's response to the argument. All of this is made *explicit* on pages 11-12 of the court's opinion, suggesting it was conscious of what it was doing but not of the implications. This is distressing because of all the constitutional guarantees, equal protection is the

easiest to comprehend. It requires no more than even handedness, that like persons be treated alike.

Here, however, the court propounds that six hours was insufficient to give *constructive* notice of the dog's barking but it will not even consider the rejoinder that notice was prevented by failing to post an emergency number so that *actual* notice could be given. And the court adds its rejection of plaintiff's rebuttal is especially justified since plaintiff could cite no authority for its position.

But on the petition for rehearing, plaintiff showed that no less an authority than the United States Supreme Court has held that the state may indulge the inference that an absentee landlord has left a caretaker in charge of the property. (*Mullane v. Central Hanover Bank* (1950) 339 U.S. 306, 70 S.Ct. 652, 658.) It follows, of course, that if the absentee landlords have *not* employed a caretaker, they should have employed some other means – like posting an emergency number – so that problems involving their property could be brought to their attention. The point is that finding no constructive notice does not put to rest the claim that the landlords, perhaps deliberately, made it impossible to reach them in the event of an emergency. This was a gated and locked complex in a densely populated neighborhood of Los Angeles. No one was home, no one was in attendance. The contention advanced in rebuttal raises the additional charge of negligence against the owner that a finding of no notice simply does not meet. (At the very least, it raises a triable issue of fact that precludes summary judgment.) But, the court *refused even to consider* the effect of this contention, except to say there is no authority for it. (Yet, this, too, misunderstands the

whole field of negligence as it is the facts which establish the authority, not vice versa. The very open-endedness of negligence – where duty is a function of facts – suggest that here, too, the court gets it wrong.)

There is a certain overlapping between due process and equal protection such that a violation of the latter will almost certainly violate the former. But equal protection addresses the peculiar nature of Justice as a *formal* virtue; it's preeminently concerned with form. And it simply means, in this context, that if the court considers an argument it must also consider and not (certainly) explicitly refuse to consider its rebuttal. The court did not do so here and a violation occurred. The court can begin to till this soil here, if it so chooses.

II Notice Is Not Needed For Nuisance

The court of appeal disposes of the nuisance claim on the same grounds on which it disposes of the negligence claim, no notice. But this disposes not of the entire nuisance claim, but only as it grows out of negligence. (Opinion, p.13.) As *Lopez, supra,* shows, this is not enough: the complaint as a whole must fail even if a cause of action is not separately pleaded. The court does not dispose of nuisance as an entire theory, however.

It's true that if notice is negated one theory of negligence is negated, but only one. And, it follows that nuisance growing out of negligence is negated as well, but only *that* type of nuisance. The problem, anyway, is that nuisance as it grows out of negligence – the failure to abate – applies only to the possessor of land, not, as here, its owner. (11 Witkin, *Equity,* §129, p. 810 (9 Ed. 1990).)

That is, the court gets the substantive law wrong and, therefore, it cannot meet that requirement of the summary judgment statute that requires the movant to be entitled to summary judgment as a matter of law. (C.C.P. §437c.)

Nuisance as such has no fixed meaning. Witkin states, "A nuisance is determined by the consequences, rather than the nature, of the defendant's conduct . . . Hence it is no defense that the activity was conducted with due care or even great care. (11 Witkin, id., §150, p. 830; see also the statutory definition which focuses on consequences to the exclusion of causes, Civil Code §3479) That is, liability for nuisance is imposed regardless of fault; it is a form of strict liability. (See, *Fredericks v. Fredericks* (1951) 108 Cal.App.2d. 242; see also, 6 Witkin, *Torts*, §1229, p. 665 (9 Ed. 1988).)

Isn't it clear, then, that notice of nuisance is unnecessary to the Rhos' liability? If nuisance is not negligence but, indeed, its antithesis, how can the court dispose of it in disposing of negligence? The "elements" are not the same. That is, for this additional reason movants are not entitled to a judgment as a matter of law.

Besides, the Rhos knew of barking dogs for over six years; they permitted a continuing nuisance. In such a case, the owner of the property is *deemed* to have notice and knowledge of it. (*City of Turlock v. Bristow* (1930) 103 Cal.App.750.) Again, the Court of Appeal diverges, without authority, to hold no notice as a matter of law when the law is directly to the contrary. To repeat, this was not an isolated instance of six hours barking, but of six *years*

of barking. If notice were required the Rhos certainly had it.

The point, however, would seem to be that if the evidence could be viewed either way – as isolated or as continuing – it was error to resolve it as a matter of law. This is not a trivial injury; it's not a trivial case. It raises fundamental statutory, interpretive and constitutional questions. It was error to summarily treat the case both at the trial and appellate levels. For the reasons already advanced in discussing negligence, the nuisance claim also merits this court's attention.

CONCLUSION

For all the foregoing reasons, petitioner asks the court to grant his petition.

Respectfully submitted,

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Petitioner's Appendix

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GERALD MC CLAIN, Plaintiff and Appellant, v. YONG H. RHO, ET AL., Defendants and Respondents.	B089809 (Super. Ct. No. BC081773) (Filed Jun. 27, 1996)

APPEAL from a judgment of the Superior Court of Los Angeles County. Harvey A. Schneider, Judge. Affirmed.

William J. Cleary, Jr., for Plaintiffs and Appellants.

Anderson, McPharlin & Conners, and Jane E. Randolph for Defendants and Respondents.

Plaintiff Gerald McClain ("plaintiff") appeals from a summary judgment granted to defendants Yong Rho and Nam Rho ("defendants"). Plaintiff brought this action against defendants after he was injured in an attempt to rescue a dog which was being cruelly treated by one of defendants' tenants. We find the judgment was properly entered and we affirm it.

BACKGROUND OF THE CASE[1]

Plaintiff filed this action on May 25, 1993. In his complaint for negligence and nuisance, plaintiff alleged he was injured while trying to untie a dog that had been tied to a tree on defendants' property. The incident occurred on the evening of June 10, 1992. Plaintiff was in his home when he heard the howls and cries of the dog. The complaint states that after listening for several hours to the dog, plaintiff took it upon himself to try to untie the dog and he injured his knee in the process.

According to a declaration filed by plaintiff in support of his opposition to defendant's motion for summary judgment, at the time of the incident, he resided on property directly adjacent to the defendants' property and had been living there for 20 years. Since 1987, the year he believes defendants' purchased the subject property, he has been bothered by "the noise of unattended barking dogs in the yard of [defendants'] property."[2] It was in 1987 that he began to notice dogs and other animals on defendants' property. According to plaintiff's

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[1] One of the documents to which plaintiff cites in setting out the facts of his case is his complaint. However, his complaint is not evidence. His deposition, and the parties declarations are evidence.

[2] Plaintiff did not describe the incidents of barking, i.e., their frequency, the time of day barking normally was heard, length of barking episodes, whether there appeared to be causes for the barking (e.g., children playing, strangers coming onto or close to defendants' property, etc.). Nor did he indicate whether he (or anyone else) ever complained to the defendants or their tenants about barking noise, even though he had been putting up with the noise since 1987.

declaration, many different animals, mostly dogs, would appear at defendants' property and then the animals would disappear. There were very few days when there weren't any animals being kept in the front and side yards. For about two years, there were rabbits housed in the yard, at least a dozen at a time.[3] On the day of the incident, he saw the dog that was making the noise. It was a small dog "whose neck was tied directly to a tree, allowing it no freedom at all to move." For six hours he attempted to locate the owners and residents of the subject property by knocking on doors of the apartments in defendants' building and by calling out, but he had no success. Nor did he have success with getting the police or animal control to alleviate the problem. At 11:30 p.m., unable to sleep because of the dog's suffering, he climbed the fence at defendants' property to get to the dog and untied it. He suffered his injuries when he fell from the fence while trying to climb back into his own yard.[4]

Defendants, who are husband and wife, each submitted a declaration in support of their motion for summary judgment. According to them, the property in question is a four-unit apartment building and at the time of plaintiff's injury the units were rented to Myung Ji Yoon, Na Najales, Tae Soo Kim, and Kwang Soo Yoo, respectively. Defendants did not live on the premises at the time of the

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[3] At his deposition, plaintiff acknowledged that he could not remember the last time before the incident that he saw a dog on defendants' property, but that it was not within a month of his injury.

[4] At his deposition, plaintiff explained that although he had access to the doors of the apartments in defendants' building, the yard in which the dog was located was separated by a fence.

incident, although they later came to live there. The property is surrounded by a fence which is four feet high and a security gate. On the day of the incident, defendants were not aware that any of their tenants were keeping dogs on the premises. The premises had not been rented to anyone with a dog. Defendant Yong Rho had been to the apartment building about two times a week during the "6 months surrounding the accident" and had never had any complaints from the tenants, nor from neighbors, about barking dogs. Defendants do not own a dog, nor do they keep any animals on the premises. They never tied a dog to a tree on the premises. They were not aware that any of their tenants had tied a dog to the tree. They were not asked to remove a dog from the property. None of the tenants complained about a dog barking on the day of the incident. The defendants' first knowledge of plaintiff's injury was when they were served with the lawsuit. After they were served, they learned that one of their tenants had tied the dog to the tree "in an attempt to rid the neighborhood area of stray cats." The June 10, 1992 incident is the only instance of which they are aware where a barking dog on their property caused any type of problem.

Defendants filed their motion for summary judgment on August 23, 1994. The order granting defendants states (1) there are no material issues of triable fact, (2) there is no evidence which would establish any negligence by defendants in operating and maintaining their rental property, and (3) there is no evidence which would establish that defendants had actual or constructive knowledge notice of the alleged nuisance. The judgment was filed November 7, 1994.

ISSUES ON APPEAL

In this appeal, we determine whether the trial court was presented with evidence from which it could say as a matter of law that no cause of action for negligence or nuisance exists against defendants.

DISCUSSION

1. *Standard or Review*

In an appeal from a summary judgment, the order granting the motion for summary judgment is reviewed de novo. (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 474.) Summary judgment is properly granted when the papers submitted by the parties show there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 865.) To defeat the motion, there must be an issue of fact which is truly material. That is, it must be an issue which is "material to the lawsuit and could change the result one way or the other if resolved in favor of one side or the other." (*Pettus v. Standard Cabinet Works* (1967) 249 Cal.App.2d 64, 69.) When the moving party is the defendant, said party "has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (o).)

2. *Relevant Law Governing a Landowner's Duty of Care*

a. *The Cause of Action for Negligence*

One of the cases cited by the trial court in granting defendants' motion for summary judgment is *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504. That case addressed the issue when, if ever, a landlord owes a duty of care to persons his tenant invites to the leased premises to prevent them from being injured by a dangerous animal being kept by the tenant on those premises. The *Uccello* court held the landlord has a duty of care only if the landlord has actual knowledge of the dangerous animal's presence on the premises and the landlord has a right to prevent the animal's presence on the premises, such as by the right to remove the animal by retaking the premises (e.g., where the rental agreement is month-to-month). In his appeal, plaintiff points out that in *Uccello*, the leased premises was a house and therefore, its yards were also part of the leased premises, whereas in the instant case, the dog that was tied to the tree was in a common area of the defendants' property, where defendant did have the right to be. Indeed, the *Uccello* court noted that one of the exceptions to the general rule of nonliability for landlords is when the landlord retains the right to control the portion of the premises on which a plaintiff's injuries occurred. (*Id.* at p. 511.) The *Uccello* court cited *Johnson v. De La Guerra Properties, Inc.* (1946) 28 Cal.2d 394 for that exception.

In *Johnston*, the court stated: "One who leases a part of the premises, retaining control of other portions such as common walks or passages which the tenant is entitled to use, is subject to liability to persons lawfully on the

land with the consent of the tenant for damages caused by a dangerous condition existing on the part under the owner's control, if by reasonable care he could have discovered the condition and made it safe. [Citations.]" (*Johnston v. De La Guerra Properties, Inc., supra,* 28 Cal.2d at p. 399.) In *Johnston,* the plaintiff was a business invitee of the tenant. The *Johnston* court concluded that the invitees of a tenant are also invitees of the landlord while on portions of the property which the invitees have a right to use and over which the landlord retains control.

Johnston, which referred to persons *lawfully* on premises and to "invitees," was decided prior to *Rowland v. Christian* (1968) 69 Cal.2d 108, which repudiated the common law distinctions between trespassers, invitees and licensees. In *Rowland,* the Supreme Court noted that these classifications represented a "departure from the fundamental rule of liability for negligence." (*Id.* at p. 113.) It noted that it and other courts had, in the past, "departed from the fundamental concept that a man is liable for injuries caused by his carelessness." (*Ibid.*) This fundamental concept of negligence is expressed in Civil Code section 1714, which states in relevant part: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." Regarding the classifications, the court said: "A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business

purpose. Reasonable people do not ordinarily vary their conduct depending on such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty. [¶] . . . The factors which may in particular cases warrant departure from [the] fundamental principle [of section 1714] do not warrant the wholesale immunities resulting from the common law classifications, and we are satisfied that continued adherence to the common law distinctions can only lead to injustice or, if we are to avoid injustice, further fictions with the resulting complexity and confusion. We decline to follow and perpetuate such rigid classifications. The proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative." (*Id.* at pp. 118-119.)

Thus, the rule set out in *Johnston*, and recognized in *Uccello*, regarding a landlord's liability to persons injured on areas over which the landlord has retained control, is not extinguished by the mere fact that a person has come upon the premises without permission. Rather, the focus is on "the general duty of the possessor of property to

exercise ordinary care with respect to reasonable foreseeable risks of personal injury to persons coming on the property." (*Beard v. Atchinson, Topeka & Santa Fe, Ry. Co.* (1970) 4 Cal.App.3d 129, 136 [child trespasser case]; accord *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1210.) However, as the *Johnston* court noted, to be liable to the plaintiff, the injury must have resulted from a dangerous condition which the landlord, by reasonable care, could have discovered and made safe. (*Johnston v. De La Guerra Properties, Inc., supra,* 28 Cal.2d at p. 399.) Thus, "a landlord may not be charged with responsibility for a defective condition unless he had actual knowledge of the condition, or it has existed for such a period of time as to justify the conclusion that, in the exercise of ordinary care, he should have known of its existence within such time as would have given him a reasonable opportunity to [correct the condition]." (*Busby v. Silverman* (1947) 82 Cal.App.2d 393, 396.) Although the *Busby* court spoke of *defective* conditions, there is no reason its analysis is not applicable to dangerous conditions also, such as existed in the instant case.[5] Indeed, *Johnston* addressed dangerous conditions.

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[5] For purposes of this appeal only, we accept the notion that tying the dog to the tree was a dangerous condition. Certainly it was for the dog, who was not able to flee from danger, and who apparently was left for hours without water and shelter. Just as with rescuers of *people* who are in distress, it is reasonably foreseeable that someone would try to rescue a dog tied to a tree in such an inhumane fashion, certainly after there had been a long, fruitless search for the person who owns the dog. Rescuers are foreseeable when someone is put in a dangerous situation. (*Solgaard v. Guy F. Atkinson Co.* (1971) 6 Cal.3d 361, 368.) Thus, when a defendant creates a dangerous situation for some third

Construing, as we must, the declarations of the defendants strictly and that of the plaintiff liberally (*Michael J. v. Los Angeles County Dept. of Adoptions, supra,* 201 Cal.App.3d at p. 866), we find that no triable issue of material fact arises from them regarding defendants' duties under general negligence principles. While there are factual discrepancies between plaintiff's and defendants' declaration, such as whether there had been dogs kept on the subject premises for any period of time (either by the tenants or by defendants themselves), these are not *material* issues of fact, because assuming arguendo the correctness of plaintiff's statements, he has only demonstrated (1) that dogs were often kept on the premises, (2) that defendants may have known about them since defendant Yong Rho came to the premises on an average of twice a week during the months surrounding the incident, and (3) that thus, defendants may have known that some or all of these dogs barked, as dogs are wont to do, especially when someone comes into their "space," as defendant Yong Rho did. This is not evidence that defendants knew of the specific problem of a dog cruelly being tied to a tree. That is significant, because plaintiff's injuries were caused by the inhumane treatment being given to the dog in question, not by the dog itself.[6] Since this

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party victim (or in the case which plaintiff seeks to make here, when the defendant permits a dangerous situation to continue), the defendant may be liable for injury sustained by a rescuer. (*Ibid.*) This is known as the rescue doctrine.

[6] We reject plaintiff's contention that what caused his accident is a question of fact, a causation question, not to be decided in this appeal. Based on the evidence presented by the parties for the motion for summary judgment, we can say as a

treatment lasted no more than six hours, we can say as a matter of law that this is not a situation where there is a triable issue of material fact as to whether defendants should have know that a problem existed in the common areas of their rental property. Thus, the element of actual or constructive knowledge of the dangerous condition is missing from the evidence presented to the trial court. Therefore, the summary judgment granted to defendant cannot be overturned on the basis of the cause of action for negligence.[7]

b. *The Cause of Action for Nuisance*

Although he does not explain why the facts of this case give rise to the existence of a nuisance, plaintiff does admit that his theory of nuisance depends on the existence of defendants' negligence. Plaintiff states: "[L]iability for nuisance may grow out of negligence, as

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matter of law that but for the dog being tied to the tree, plaintiff's injuries would not have occurred. Nothing in the evidence indicates plaintiff would have otherwise climbed over the fence to go into defendants' yard.

[7] In his reply brief, plaintiff raises the issue whether the defendants had a duty to post a number at their rental property whereat they could be reached in case of an emergency. He raises this issue because defendants contend he has not produced evidence they previously knew that a dog had been tied, and not produced evidence he ever complained to them about the dogs. Since our decision in this appeal rests only on the fact that as a matter of law we can say there was no actual or constructive notice to defendants of the dangerous condition, we do not address this issue. Further, plaintiff provides no authority which would support this proposed duty to post an emergency telephone number.

in the failure to remove a condition to prevent harm. [Citation.]" Because we can say as a matter of law the facts of this case cannot present a case of negligence, plaintiff's assertion of nuisance also fails.

DISPOSITION

The summary judgment is affirmed. Costs on appeal to defendants.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, Acting P.J.

We concur:

ALDRICH, J. RECANA, J.*

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* Assigned by the Chairperson of the Judicial Council.

Second Appellate District, Division Three, No. B089809
S054926

IN THE SUPREME COURT OF CALIFORNIA

GERALD MC CLAIN, Appellant

v.

YONG H. RHO Et Al., Respondents

(Filed Oct. 16, 1996)

Appellant's petition for review DENIED.

GEORGE
Chief Justice